THE LAW OF THE PUBLIC CALLINGS AS A SOLUTION OF THE TRUST PROBLEM.

THE distinction between the private callings — the rule — and the public callings — the exception — is the most consequential division in the law governing our business relations. In private businesses, one may sell or not as one pleases, manufacture what qualities one chooses, demand any price that can be gotten, and give any rebates that are advantageous. It is because the trusts are carrying on a predatory competition under the cover of this law that we have the trust problem. All this time in public businesses one must serve all that apply without exclusive conditions, provide adequate facilities to meet all the demands of the consumer, exact only reasonable charges for the services that are rendered, and between customers under similar circumstances make no discriminations. If this law might be enforced against the trusts, it is believed that a solution of the problem would be found. In this time of peril to our industrial organization faith in our common law may show the way out. It cannot be that this law has guided our destinies from age to age through the countless dangers of society, only to fail us now.

I.

In Plantagenet England, as we see it through the medium of our earliest law reports, the mediæval system was breaking down and the modern organization springing up. Restriction of trade with some freedom left had been the old policy, freedom of commerce with some restriction was the new ideal. In the common law courts the judges were already enunciating the law of the new régime: with regard to private businesses they were saying that it lay in the election of the tradesman whether he would supply a customer or not, but with regard to the public callings that one was compelled to serve any one that tendered him ready payment. Great as was the change from the old economy to the new theory, it was not complete.

This distinction of the public callings from the private callings was often of the utmost importance. Whether a man was in a

common employment or not often made all the difference between the success of a writ or its failure. Primitive as the notions of legal liability were, the essential distinction between the obligations of those who were in public employment and the duties of those who were in private business was observed as one of the fundamental things in the legal system. And although many of these decisions are long since obsolete in one way or another, the subsequent changes in the general law in no manner affect the force of these decisions in establishing the nature of the distinction between the law of the public callings and the law of the private callings.

One such decision is an Anonymous suit in 1441.[1] This was a writ of trespass on the case against one R., a veterinary surgeon, to the effect that the defendant had undertaken to cure the plaintiff's horse with skill and care of a certain trouble, and that he then so negligently and carelessly gave medicines that the horse died. In the opinion of Paston may be seen the ground upon which the court proceeded: "You have not shown that he is a common surgeon to cure such horses, and therefore although he has killed your horse by his medicines, you shall have no action against him without an assumpsit." The court accordingly decided that a traverse of the assumpsit made a good issue. The significance of the special promise in those days was that when one man had authorized another to deal with property in the course of private business, the latter was under no legal liability to use care, unless he had made such a special promise. In the public businesses on the other hand the legal obligation to perform the act with proper skill was well established.

In England of the fifteenth century such professional men were few. This was in part due to the rudeness of the time, which made education unusual, and produced necromancers, not physicians. It was in part to be traced to the restrictions which the mediæval system had put upon the practice of the profession. At all events, in the common case only one surgeon would be at hand in any one district, so that if he should refuse to bleed the patient, all might be lost. Such being the situation, it is easy to understand why the law was so stern in the case of the common doctor who undertook to cure all who came, requiring him to act with care although he promised none, and giving the patient an action

[1] Y. B. 19 H. VI. 49. 5.

although he had submitted himself to the operation, if the doctor was negligent. It was the unusual situation which produced this extraordinary law.[1]

Another instance is shown in an Anonymous note in 1450.[2] "Note that it was agreed by all the court that when a smith declines to shoe my horse, or an innkeeper refuses to give me entertainment at his inn, I shall have an action on the case notwithstanding no act is done; for it does not sound in agreement. But where a carpenter makes a bargain to build me a house and does nothing, no action on the case, because that does sound in agreement." The meaning of this is that in those days no action lay upon a mere agreement, a promisor need not perform; but that one who undertook a public employment must perform, whether he agreed or not. Here again the common law obligation resting upon those in common calling to serve all that apply is the basis of the case.

Why is this entire distinction made between the wayside smith and the journeyman carpenter? Because again the economic conditions of these trades were so different. So far apart were they in the eyes of the courts, that the ordinary law was protection enough for those that dealt with the carpenter, while an extraordinary law was needed in behalf of those that came to the smith. There were builders enough to make the situation in that business virtual competition, so that there was no hardship; but the farriers were so scattered that the conditions were those of virtual monopoly, which required therefore a special code, else a good horse might be ruined for want of a shoe if the wayside smith should take it into his head to refuse to serve.[3]

Perhaps the most noteworthy of the common callings admitted by the early law was that of the innkeeper. In another Anonymous report in 1460[4] Moile, J., is quoted as saying: "If I come to an innkeeper to lodge with him, and he will not lodge me, I shall have on my case an action of trespass against him; and in the same way if I come to a victualler to buy victual, and he will not sell, I shall have an action of trespass on my case against him;

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[1] To the same effect are Y. B. 43 Ed. III. 6. 11; Y. B. 3 H. VI. 36. 33; 14 H. VII. Ras. Etn. 2. b. 1.

[2] Keilway 50. 4.

[3] To the same effect are Y. B. 21 H. VI. 55. 46; Y. B. 46 Ed. III. 19. 19; Y. B. 12 Ed. IV. 13. 9.

[4] Y. B. 39 H. VI. 18. 24.

and still in such cases if he will bring a writ of debt against me on such duty I shall have my law." This stands to the present day as the law of the land.

The innkeeper is in a common calling under severe penalty if he do not serve all that apply, while the ordinary shopkeeper is in a private calling free to refuse to sell if he is so minded. The surrounding circumstances must again explain the origin of this unusual law. When the weary traveller reaches the wayside inn in the gathering dusk, if the host turn him away what shall he do? Go on to the next inn? It is miles away, and the roads are infested with robbers. The traveller would be at the mercy of the innkeeper, who might practise upon him any extortion, for the guest would submit to anything almost, rather than be put out into the night. Truly a special law is required to meet this situation, for the traveller is so in the hands of the innkeeper that only an affirmative law can protect him. But the case of a customer in a town is altogether different. There are shops in plenty and he has time to choose. If he is charged an exorbitant price by one shopkeeper, all that he need do is to leave that shop and go to the next. No special law is required to meet this situation because, since the seller knows that the buyer may always do this, he in fact will almost never repulse him; rather he will by a low price induce him to purchase. The processes of competition may be trusted in the case of the shop, they do not act with any certainty in the case of the inn.[1]

A summary of this early law governing the public callings is to be found in one of the leading cases on carriers, Jackson *v.* Rogers[2] in 1683. "This was an action on the case, for that whereas defendant is a common carrier from London to Lymmington *et abinde retrorsum*, setting it forth as the custom of England, that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them, though offered his hire. And held by Jefferies, C. J., that the action is maintainable, as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same. Note, that it was alleged and proved that he had convenience to carry the same; and the plaintiff had a verdict." Indeed, that the common carrier is in public employment has never been doubted in the course of our law.

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[1] To the same effect are Y. B. 22 Ed. IV. 49. 15; Y. B. 10 H. VII. 8. 14.

[2] 2 Show. 237.

Again the explanation must be sought in the history of the times. In merry England the population lived in communities apart from each other, so that small attention was paid to the roads, which were no more than trails winding through the wilderness. No cart could pass over them, only pack animals, and so many were the bands of outlaws in the greenwood that no man might with safety traverse these paths alone, so that the transportation of goods was given over to the carrier, who travelled with oftentimes trains of pack animals and a considerable company. It was also the fact that one carrier or few would thus pass over the same roads between the same towns, because the traffic was still comparatively small, as England had not yet changed from a local economy where each community was sufficient to itself, into a national economy which would involve interchanges of goods between distant markets. The conditions surrounding transportation were therefore those of virtual monopoly. The merchant had therefore the protection of the law, a protection without which he stood no chance against oppression by the carrier.[1]

During the nineteenth century the common carrier has become of such consequence in the industrial organization, as the very condition of modern commerce, that the other public callings have been overshadowed and have been at times almost lost to sight; but in the fifteenth century barber and surgeon, smith and tailor, innkeeper and victualler, carrier and ferryman were of more or less equal concern to the law. That these callings were put into a class by themselves, that an unusual law was applied to them, that this was sternly enforced, and that it was elaborately worked out — all these things cannot be without their modern significance. The common law like its English king never dies, it persists from age to age, and though the instance of its rules may be seen to change as old conditions pass away and new conditions arise, its fundamental principles remain. The cases just under discussion are illustrations of the course of events. Barber, surgeon, smith, and tailor are no longer in common calling because the situation in the modern market does not call for it; but innkeeper, victualler, carrier, and ferryman are still in that classification, since even in modern trade the conditions require it.

The essential thing in all this is the recognition of the common

[1] To the same effect is Y. B. 22 Ass. 94. 41.

calling as a thing apart from the private calling, presenting different conditions, involving the necessity therefore of further law than that which suffices to regulate ordinary businesses. In these earliest examples there are certain elements in the situation which are so characteristic that the realization of them should lead to some conception of the nature of the public employment. It would be too much to expect to see the law settled in these times, to find modern aspects of the problem altogether anticipated; but it is not too much to hope to discover some meaning in the group of allied cases, some definition of the first principles involved. Upon the whole the circumstances surrounding these cases suggest this as the characterizing thing; that in the private calling the situation is that of virtual competition, while in the public calling the situation is that of virtual monopoly.

II.

The mediæval system with its basis of unfree trades did not pass away altogether; and the more modern society did not make all businesses free. Many and various franchises still confronted one in the country for many succeeding centuries, the remnants of the manorial system, — frankfold and park, warren and piscary, market and mill. In the towns, on the other hand, the craft gilds and the gilds merchant continued their privileges in the mystic fraternities and the trading companies, as the law reports bear evidence. These established institutions the courts tried to convince themselves were necessary for the proper regulation of those trades for all concerned therein.[1]

It was not, however, from choice that our courts dealt with legal monopolies. If they could have had their way in the early days, the ordinary trades would have been immediately opened to all, for the courts felt keenly the discrepancy between the general theories of their society and the occasional practices of their sovereigns. The great Case of Monopolies[2] shows an extraordinary prejudice against that famous patent of the crown which granted

[1] Examples of the restriction of competition under the manorial system may be seen in: Y. B. 3 Ed. III. 3; Y. B. 11 H. VI. 19; Fermor *v.* Brooke, Cro. Eliz. 203; Hix *v.* Gardner, 2 Bulst. 195; Fitzwaller's case, 3 Keeble 242; under the gild system, in: Davenant *v.* Hurdis, Moore 245; London case, 5 Co. 616; Wagoner's case, 8 Coke 121; Warmel *v.* London, 1 Strange 675; Gunmakers *v.* Fell, Willes 384; Rex *v.* Surgeons, 2 Burr 892.

[2] 9 Co. 84.

the sole making of cards within the realm to some favorites of her Majesty. So outraged was the court when this patent was pleaded that they were led to defy even a Tudor sovereign in the exercise of her undoubted prerogative.

Popham, Chief Justice, and the whole court resolved: "That it is a monopoly, and against the common law. All trades as well mechanical as others which prevent idleness (the bane of the commonwealth) and exercise men and youth in labor for the maintainance of themselves and their families, and for the increase of their substance to serve the Queen when occasion shall require are profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is against the common law and the benefit and liberty of the subject. The second incident to a monopoly is that after the monopoly is granted, the commodity is not so good and merchantable as it was before; for the patentee having the sole trade regards only his private benefit, and not the commonwealth."

Splendid as was this judicial outburst, it was nevertheless so clearly against the law and the constitution that it furnished no precedent. Never since have the courts declared a franchise void when in point of law and constitution its case was perfect; for in such a case it is recognized now that the courts have no choice but to admit the condition of things created. In the interpretation of such grants, however, the courts have had an opportunity to declare their policy, and since the case of the Charles River Bridge [1] it has been recognized that competition is never to be excluded by implication, but only when it is forbidden by express stipulation. Such a rule of construction could not exist unless there were this cast in the mind of the courts.[2]

Of late years, however, another point of view has been taken which regards as valuable the creation of exclusive franchises as a method of dealing with the public service situation. This is shown in a modern definition of the nature of the franchise. In California *v.* Pacific Railroad [3] the State Board of Equalization of California included in the assessment of the Pacific Railroads which had been

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[1] 11 Pet. 420.

[2] Examples of the limitation of franchise may be seen in: Charles River Bridge *v.* Warren Bridge, *supra;* Horse Railway *v.* Cable Railway, 30 Fed. Rep. 388; Gas Co. *v.* Gas Co., 25 Conn. 19; Illinois Canal *v.* Chicago R. R., 14 Ill. 314; Turnpike Co. *v.* Railroad, 21 Vt. 895; Canal *v.* Va. R. R., 11 Leigh, 73.

[3] 127 U. S. 1.

chartered by Congress a large sum for the franchise. The constitutional question was thereupon raised whether it was possible for a state government to tax in this way an instrumentality of the federal government. In deciding this question the court was necessarily led to a determination of the nature of the modern franchise.

Mr. Justice Bradley said: "What is a franchise? Under English law Blackstone defines it as a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject. Generalized and divested of the special form which it assumes under a monarchial government based on feudal traditions, a franchise is a right, privilege, or power of a public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents, acting under such conditions and regulations as the government may impose in the public interest and for the public security. Such rights and powers must exist under every form of society."

Experience has shown that the truth of the matter is that the imposition of an occasional monopoly may be advantageous in the ordering of the industrial system. The policy of the grant of an exclusive franchise has appeared in various circumstances. More frequently than formerly this is the method taken by the modern state for dealing with the troublesome problem of the public utilities, for experience has shown that in the nature of the case many of the public works can be conducted with advantage only upon the basis of exclusive franchise. The telephone system is a conspicuous instance; for a single system of telephones can alone serve to satisfactorily bring together all the telephone users of a community. And in a less obvious case the waste by duplication of plants is so scandalous that the ultimate benefit to the community from giving an exclusive franchise, as to one gas company for example, must be admitted, when the futility of expecting any permanent competition has been so long exposed. Indeed it is now recognized by many advanced thinkers that it is necessary for the perpetuity of competitive conditions in general, that, in the particular instances of monopolistic conditions, the state should proceed to establish a legal monopoly, and then apply to that situation such strict regulation as the exigency demands.[1]

[1] Examples of franchises of this sort may be seen in: Binghamton Bridge, 3 Wall. 75, Sands *v.* River Improvement, 123 U. S. 288; Boston, etc., R. R. *v.* Salem, etc., R. R., 2 Gray 1; St. Louis St. Ry. *v.* Northwestern St. Ry., 69 Mo. 65.

The leading case upon legal monopoly without doubt is Allnutt *v.* Inglis.[1] The question that arose there was whether the London Dock Company had a right to insist upon an arbitrary hire for receiving wines into its warehouses, or whether they were bound to receive them there for a reasonable reward only. It appeared that by virtue of the Warehousing Act the existing state of things in the port of London was that that company alone had the legal privilege of taking goods in bond.

Lord Ellenborough said in part: "There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms. Here then the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose."

According to this case legal monopoly has its correlative legal obligation; that is, the acceptance of an exclusive right involves a continuous duty to serve all that apply. This solution is in reality the logic of the situation. If by force of his franchise the holder could refuse facilities to all the world, the position of things would be intolerable. The law of this case is the escape from that contingency. It does not deny that the monopoly exists to its full extent, but it puts upon the monopolist the limitation that he may charge reasonable prices only. It is in this way that in modern times the crisis is avoided.[2]

One of the earlier instances of this rule in the United States is to be found in Shepard *v.* Milwaukee Gas Light Company.[3] The plaintiff complained of the refusal of the established gas works to supply him. The defendant claimed that under the circumstances of the case it was not bound to serve the plaintiff. Mr. Justice Smith held that the gas company was bound to sell its gas to every citizen of Milwaukee upon compliance with such regulations only as the company might rightfully impose.

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[1] 12 East 527.

[2] The following cases may well be compared with the case mentioned in the text: Davis *v.* State, 68 Ala. 58; Dock Co. *v.* Garrity, 115 Ill. 155; Nash *v.* Paige, 80 Ky. 539; Ryan *v.* Terminal Co., 102 Tenn. 119; Barrington *v.* Dock Co., 15 Wash. 175.

[3] 6 Wis. 539.

His argument was this: "It is sufficient for the purposes of this case to know that the company had the exclusive right to manufacture and sell gas, and that hence the only means of supply available to citizens was through the agency of the company. Corporations of this kind are not like trading or manufacturing corporations whose productions may be transported from market to market throughout the world. Its manufacture depends upon the consumption of the immediate neighborhood for its profit and success, and upon no other place. From the nature of the article, the objects of the company, their relations to the community, and from all the considerations before mentioned, it is to me apparent that the company is not at all analogous to an ordinary manufacturing or trading corporation."

In the modern theory under discussion the creation of an exclusive franchise is indefensible unless the public convenience is thereby increased. In a case such as this of the gas company, the applicant would have to accede to whatever demands the company might make, or go without any supply, did not the law step in and command the company to supply him upon reasonable conditions. Whenever therefore such an exclusive franchise appears, the courts are prompt to put the company into the class of public servants, requiring it to serve the public in exchange for the privilege granted it by the people.[1]

Weymouth *v.* Penobscot Log Driving Company,[2] a case outside the beaten track, shows that the doctrine of public calling will be extended to any case in which the decisive circumstance of legal monopoly is shown. This was an action by a lumberman who had hauled his logs to various landings on the west branch of the Penobscot River where he had notified the company that they were located, brought against the log driving company because those in charge of the drive had carelessly left the logs behind so that they did not come to market that year. The company requested the court to instruct the jury that the corporation was not under any legal obligation to drive the logs upon request.

Mr. Justice Danforth held that the instruction was properly refused under the circumstances. "In this case the charter con-

[1] This same situation may be seen in *In re* Pryor, 55 Kans. 730; Lumbard *v.* Stearns, 4 Cush. 60; Gas Co. *v.* Calliday, 25 Md. 1; Wood *v.* Auburn, 87 Me. 287; Griffin *v.* Water Co., 122 N. C. 206; Cincinnati R. R. *v.* Bowling Green, 57 Oh. St. 366.

[2] 71 Me. 29.

ferred the privilege of driving, not a part, not such a portion as the company might choose, but 'all' the logs to be driven. This right having been accepted by the company, it became a vested and also an exclusive right. It is therefore taken not only from all other corporations, but excludes the owner as well. By its acceptance and exclusion of the owner from the privilege, in justice and in law it assumed an obligation corresponding to and commensurate with its privilege. It accepted the right to drive *all* the logs, and that acceptance was an undertaking to drive them *all*, or to use reasonable skill and diligence to accomplish that object."

Upon the whole this case better than most shows the impossibility of any other decision in cases like this of legal monopoly. Formerly the river was open to every one for the purpose of floating his logs to market; now it was closed to every one. A lumberman whom the company refused to serve would therefore have no alternative, since to drag his logs overland to market would not be a commercial possibility. No reasonable system of law would leave without relief a man confronted with such a situation. If any rule in our law is dictated by natural justice, this one would seem to be.[1]

III.

Wherever virtual monopoly is found the situation demands this law that all who apply shall be served, with adequate facilities, for reasonable compensation and without discrimination; otherwise in crucial instances of oppression, inconvenience, extortion and injustice there will be no legal remedies for these industrial wrongs. This is as true where the origin of this condition of monopoly is in natural limitations as where the establishment of it is by fiat of the state. Actual monopoly should be dealt with upon the same basis as legal monopoly; and indeed is so treated by the inclusion of both within the law of public employments.

No one can study the authorities upon this subject without feeling that we are just now entering upon an important development of the common law. It is at the present time difficult to predict what branches of industry will eventually be held of such public consequence as to be included in the category of public callings,

[1] A few such cases, selected at random, are: Price *v.* Riverside Co, 56 Cal. 431; Wright *v.* Platte Co., 27 Col. 322; Hockett *v.* State, 105 Ind. 250; Mann *v.* Log Co., 46 Mich. 38; People *v.* New York, etc., R. R., 28 Hun 543.

because in the last few years the field has extended so widely before our very eyes. However we now have so much material for analogy and comparison that it ought to be possible to advance, in a tentative way at least, a series of tests that may indicate in a general way whether or not a business has attained such control of its market as to become of the class of public employments.

One of the earliest needs of a community is a supply of water for domestic uses; and it has been always obvious that this is a public utility in a true sense of that term. Accordingly it was conceded from the first that the situation demanded a coercive law; but the extent to which that law took the disposition of the business out of the discretion of the corporations which provided the supply was not appreciated. Hangen *v.* Albina Water Company[1] is a late illustration. The defendant company laid a main through Tillamook Street upon which the applicant lived; but the defendant from the first refused to supply water to persons living between the east line of the township and Fourteenth Street, within which limits the plaintiff resided.

Mr. Justice Lord said in part: "It must be conceded that the defendant is engaged in a business of a public and not of a private nature, like that of ordinary corporations engaged in the manufacture of articles for sale, and that the right to dig up the streets and place therein pipes or mains for the purpose of conducting water for the supply of the city and its inhabitants, according to the express purpose of its incorporation and the business in which it is engaged, is a franchise, the exercise of which could only be granted by the state, or the municipality acting under legislative authority. In such case, how can the defendant, upon the tender of the proper compensation, refuse to supply water without distinction to one and all whose property abuts upon the street in which its pipes are laid? If the supplying of a city or town with water is not a public purpose, it is difficult to conceive of any enterprise intrusted to a private corporation that could be classed under that head."

Various elements combine to make the business of supplying water to a community a public calling. Perhaps the chief of these is the natural limitation of the sources which makes the interposition of the state in aid of the enterprise necessary. The method of distribution through pipes requires the permission of the local

[1] 21 Ore. 411.

authorities in order to lay the pipes in the public streets. All this makes competition with the established company improbable, if, indeed, it does not make it impossible. At all events, monopoly in this service is so founded in the nature of things that competition there is all but unknown.[1]

When the first works were constructed to furnish gas through mains laid in the public streets to various householders in the community at large, new conditions in the supply of illumination were created. Before that time illuminants had been commodities, bought and sold in packages, purchasable at various shops scattered over every city. The keepers of these shops had never been compelled to sell to all that required of them; why then, it was asked, must gas companies be compelled to do so? At first such doubts had some currency with the courts, but at the present time there is a general agreement that mandamus should issue to compel a recalcitrant company to supply an aggrieved applicant.

Portland Gas Company *v.* State[2] is an important case on this point. The particular issue was whether a gas company could refuse an applicant upon the ground that he was then being served by another gas company. The fundamental character of this problem is apparent.

In granting the mandamus Mr. Justice Coffey said: "Gas companies, being engaged in a business of a public character, are charged with the performance of public duties. Their use of the streets, whose fee is held by the municipal corporation in trust for the benefit of the public, has been likened to the exercise of the power of eminent domain. Accordingly, a gas company is bound to supply gas to premises with which its pipes are connected. It has often been held that mandamus is the proper proceeding by which to compel a gas company to furnish gas to those entitled to receive it. In view of these authorities, we are constrained to hold that a natural gas company, occupying the streets of a town or city with its mains, owes it as a duty to furnish those who own

[1] The following cases, among others, hold the water companies to be in public calling: Spring Valley Works *v.* Shoutes, 110 U. S. 347; Smith *v.* Water Works, 104 Ala. 315; Water Co. *v.* Fergus, 178 Ill. 571; Shiras *v.* Ewing, 48 Kans. 170; Water Co. *v.* Adams, 84 Me. 472; Turner *v.* Water Co., 171 Mass. 336; McDaniel *v.* Water Works, 48 Mo. 273; American Water Works *v.* State, 46 Neb. 1194; Olmstead *v.* Morris Aqueduct, 47 N. J. Law 335; Silkman *v.* Water Comm'rs, 152 N. Y. 327; Griffin *v.* Goldsboro Water Co., 112 N. C. 206; Brymer *v.* Buller Water Co., 179 Pa. St. 231; Watauga Water Co. *v.* Wolfe, 99 Tenn. 429.

[2] 135 Ind. 54.

or occupy the houses abutting on such street, where such owners or occupiers make the necessary arrangements to receive it and comply with the reasonable regulations of such company, such gas as they may require, and that, where it refuses or neglects to perform such duty, it may be compelled to do so by writ of mandamus."

What, after all, is that element in the situation which differentiates the vending of candles from the purveying of gas? Is it not this, — that the box of candles may be sent from any factory into any market, a condition which preserves virtual competition in the sale of candles; while a thousand feet of gas can only be got by the consumer from the local gas company, a situation which presents an inevitable monopoly in the supplying of gas. It is in that sense that the monopoly of the local company is natural, and it is for that reason that it is permanent. Experience confirms this statement, that seldom in any community will competitive conditions prevail in the supply of gas, and never are these conditions lasting. This consideration must be at the basis of the universal holding at the present day that the business of gas making is one of the public services.[1]

The best discussion of the nature of public calling is to be found in the cases concerning the telephone. These again are most of them common law decisions, so that they disclose the essential tests by which public calling is established. One of the best of these cases, because of its full working out of the problems, is State *v.* Citizens' Telephone Company.[2] It appeared in this case that one Gwynn had a grocery, in which was a telephone of the Citizens' Telephone Company. Later he bought a market next door and cut a door through the wall, and in this market there was a telephone of the Southern Bell Telephone Company. The Citizens' Company thereupon refused to have any dealings with Gwynn unless he should agree to use their system exclusively in both stores. A mandamus was confirmed to Gwynn as relator against the Citizens' Company by Mr. Justice McIver, entitling

[1] The following decisions among others hold the gas companies to be in public calling: Montreal Gas Co. *v.* Cadreux [1899], A. C. 589; Gibbs *v.* Gas Co., 130 U. S. 396; Smith *v.* Gas Co., 132 Cal. 309; Coy *v.* Gas Co., 146 Ind. 655; *In re* Pryor, 55 Kans. 730; Louisville Gas Co. *v.* Drelaney, 100 Ky. 408; Gas Co. *v.* Calliday, 25 Md. 1; Williams *v.* Gas. Co., 52 Mich. 599; People *v* Manhattan Gas Co., 45 Barb. 136; Lanesville *v.* Gas Co., 47 Oh. St. 1; Bailey *v.* Fayette Gas. Co., 193 Pa. St. 175; Hotel Co. *v.* Gas Light Co., 3 Wash. 316; Shepard *v.* Milwaukee Gas Co., 6 Wis. 539.

[2] 61 S. C. 83.

him to have a telephone notwithstanding that he still refused to enter into an exclusive agreement, because the enforcement by the company of such a condition was contrary to its public duty. In the words of the court: "The undisputed facts are that the respondent, in the exercise of its franchise conferred by its charter, had established a telephone business in the city of Spartanburg, and had erected its poles and strung its wires in and along the streets of said city, and thus had become, at least, a *quasi* common carrier of news, and as such was under an obligation to serve all alike who applied to it within reasonable limitations, without any discrimination whatsoever. When, therefore, the relator applied to the respondent to replace the telephone instruments in his grocery store and in his residence, from whence they had been removed by the defendant company but a few days before, the respondent was, in our opinion, bound to comply with such demand, under the obligations to the public which it had assumed. The reason given for its refusal — that the relator refused to agree that he would use respondent's telephone system exclusively — was not sufficient to relieve it from its obligation to serve the public, of which the relator was one, without any discrimination whatsoever." In the case of the telephone identical services must be provided to make competition possible; for it is not enough to get new takers into a new system, the old ones must be gotten in to satisfy the new ones.

From an economic point of view the duplication of plant that is necessary to make competition possible in these public utilities is sheer waste, without compensating advantages. From a business point of view this fact is a most effective deterrent. When one of these public services is established in a neighborhood, it is infrequent that men will be found to invest their money in the construction of another plant. The risk of loss in such a case is too great, for since the market for both old and new is limited to the locality, the struggle must of necessity be so desperate that neither can expect to escape serious injury. Moreover, since most of such public works are permanent in their construction, if the venture fails of success an attempt to remove them would result in almost total loss.[1]

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[1] The following decisions among others hold the telephone companies to be in public calling: State *v.* Telephone Co., 23 Fed. Rep. 539; Hockett *v.* State, 105 Ind. 250; Telephone Co. *v.* Talley, 118 Ind. 194; State *v.* Telephone Co., 17 Neb. 126; People *v.* Hudson Telephone Co., 19 Abb. N. C. 466; State *v.* Telephone Co., 36 Oh. St. 296;

In the present generation a new method of illumination by electricity was devised which involved distribution from a central plant by a system of wires radiating through the localities served. The essential features of the electric business are so like the main conditions in the gas business, it was obvious that the same law of public service was to be enforced in this instance. Indeed, it is most significant that no electric light company has ever squarely denied that there rested upon it the primary obligation to serve all.

All this is most significant; for it shows that the law of public service has now such general acceptation that in any new instance that is obvious it will be applied by the courts without hesitation. The latest case is Snell *v.* Clinton Electric Light Company,[1] where the company refused to furnish electric light to the applicant until he paid the cost of the transformer. The real reason for the refusal was a business policy of the company to increase their operations by charging applicants for transformers unless the wiring of the house was done by the company itself. In the present case the wiring was done by outside parties, but the jury found that the residence was properly wired.

In holding for the consumer Mr. Justice Carter stated the fundamental propositions involved in this way: "There is no statute regulating the manner under which electric light companies shall do business in this state. They are therefore subject only to the common law, and such regulations as may be imposed by the municipality which grants them privileges. Appellee, being organized to do a business affected with a public interest, must treat all customers fairly and without unjust discrimination. Both reason and authority deny to a corporation clothed with such rights and powers and bearing such a relation to the public the power to arbitrarily fix the price at which it will furnish light to those who desire to use it. The company was bound to serve all its patrons alike, it could impose on the plaintiff in error no greater charge than it exacted of others." It is noticeable that in this opinion only one of the cases cited is that of an electric light company; the other examples cited involve gas and water, telephone and telegraph, proof positive that in the mind of the court these all fall within one department of the law.

Telephone Co. *v.* Com., 3 Atl. Rep. 825; Gardner *v.* Telephone Co., 23 R. I. 312; Telephone Co. *v.* Telephone Co., 61 Vt. 241.

[1] 196 Ill. 626.

In this business of electric lighting one element in the conditions which produce monopoly is prominent, — the absence of the substitute; that is, the cost to the consumer of shifting for himself if he is refused. No electricity at all can be produced by the smaller consumers without the installation of apparatus of considerable cost, operated thereafter at large expense. Moreover, this is a business where when the units are smaller the cost of production is greater by a surprising ratio, so that in ordinary conditions none of the larger consumers would go to supplying them unless the rates of the company were unreasonable. This state of affairs would put the patron at the mercy of the company, unless the law interposed and compelled the rendition of service upon a reasonable basis.[1]

These four examples are enough perhaps to show the general nature of the conditions which characterize public calling. In the case of each illustration emphasis was placed upon one or the other of these elements; while the truth of the matter is that most of them exist in all. Thus in the usual public calling some natural limitation of some sort will be discovered, some control of the market from the character of the product; the cost of the duplication of the plant will be great, and the substitute will cost more than the original. These are the conditions that deter competition and foster monopoly.

The positive law of the public calling is the only protection that the public have in a situation such as this, where there is no competition among the sellers to operate in its favor. So much has our law been permeated with the theory of *laissez faire*, which was but lately so prominent in the policy of our state, that the admission has been made with much hesitation that state control is ever necessary. But the modern conclusion, after some bitter experience, is that freedom can be allowed only where conditions of virtual competition prevail, for in conditions of virtual monopoly, without stern restrictions, there is always great mischief. There is now fortunately almost general assent to state control of the public service companies, since it is recognized that that special situation requires a special law. That law is based upon the conclusion that it is no inconsistency for the State to leave the generality of busi-

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[1] The following decisions among others hold the electric companies to be in public calling: Andrews *v.* Electric Light Co., 53 N. Y. Supp. 810; Cincinnati R. R. *v.* Bowling Green, 57 Oh. St. 336.

ness free from restrictions, while controlling with a strict code such lines of industry as are affected with a public interest.

The working out of this detailed law governing public calling is now going on so rapidly that it already is of real value in grappling with actual abuses, such as exclusive demands, inadequate facilities, hidden overcharges, and undue discriminations. At the same time, as will be seen, new businesses are being put into the class of public employments, so that a greater variety of industries are now within the law. It seems only a question of time when the question will be raised for determination whether these great industrial trusts are public service companies. If ever a decision shall put them into that classification, it is submitted that the law of public services will be found to have developed far enough to meet the exigencies raised by the complexity of their operations.

Bruce Wyman.